A

MOHD YAZID MOHD SHARIFF v. PP

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
B [CRIMINAL APPEAL NO: P-05-277-09-2014]
13 APRIL 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused convicted for trafficking in 4,550g cannabis and sentenced to death –*
C *Dangerous Drugs Act 1952, s. 39B(1) – Whether defence raised any reasonable doubt on prosecution's case – Whether conviction and sentence safe*

CRIMINAL PROCEDURE: *Charge – Defective charge – Accused charged for trafficking in dangerous drugs – Charge omitted whether trafficking was committed*
D *pursuant to limb (a), (b) or (c) of s. 39B(1) of Dangerous Drugs Act 1952 – Whether charge defective – Whether fatal to prosecution's case – Whether accused misled or prejudiced by omission – Whether occasioned in failure of justice – Whether error or omission curable – Criminal Procedure Code, s. 422*

EVIDENCE: *Exhibits – Break in chain of evidence – Dangerous Drugs Act 1952,*
E *s. 39B(1) – Accused charged for trafficking in dangerous drugs – Whether drugs seen, seized and handed by marker to investigating officer same as drugs handed by investigating officer to chemist – Whether there was break in chain of evidence*

EVIDENCE: *Conflicting testimonies – Witnesses contradicted on material point – Trafficking in dangerous drugs – Dangerous Drugs Act 1952, s. 39B(1) – Weight*
F *of drugs – Discrepancy in testimonies on weight of drugs between marker, chemist and prosecution – Whether drugs seized were same as exhibits tendered in court*

Upon receiving information that a certain drug trafficking activity would take place, police officer PW7 assumed the role of an agent provocateur and met a man known as Black ('the appellant') at a stall to purchase cannabis. The
G appellant requested PW7 to contact him in one or two weeks' time. More than a week later, PW7 contacted the appellant and the next day, they met at a petrol station. The appellant instructed PW7 to follow him because the petrol station was deemed unsuitable for the dealing. They arrived and stopped in front of a restaurant where PW7 was told to wait because the
H appellant wanted to fetch the cannabis. The appellant arrived 15 to 20 minutes later with a black plastic bag and informed PW7 that the cannabis was in the plastic bag. PW7 examined the plastic bag and found five slabs of compressed plant materials suspected to be cannabis. He signalled the ambush team and they sprung into action. The appellant tried to take flight
I but was successfully arrested. The five slabs of compressed plant materials were later confirmed by the chemist ('PW4') to be 4,550g of cannabis. The appellant was charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1) of the Dangerous Drugs Act 1952 ('the DDA').

Satisfied that the prosecution had established a *prima facie* case, the appellant was called to enter his defence. In his defence, the appellant denied (i) meeting PW7 at the stall; (ii) negotiating for the sale and supply of the drugs; (iii) being known as Black; and (iv) having knowledge of the contents of the plastic bag and showing the same to PW7. The trial judge rejected the defence posited by the appellant and found that that the appellant failed to raise any reasonable doubt on the prosecution's case. The appellant was found guilty, convicted for the offence and sentenced to death. Hence, the present appeal. The issues that arose for the court's determination were (i) whether the charge was defective because it omitted whether trafficking was committed pursuant to limb (a), (b) or (c) of s. 39B(1) of the DDA; (ii) whether there was break in the chain of evidence; and (iii) whether there were discrepancies in the weight of the said drugs because (a) the marker ('PW5') submitted that it was 4,700g; (b) PW4 submitted that it was 4,550g; and (c) the prosecution submitted that it was 9,623g.

Held (dismissing appeal; affirming conviction and sentence of High Court) Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The charge was sufficient, valid and was not fatal. The said error or omission was not a matter of substance but a mere technical non-compliance of the provision of the law which could be condoned as an irregularity and curable under s. 422 of the Criminal Procedure Code. The appellant was not misled nor prejudiced by the omission of the prosecution. He was aware and knew exactly the nature and essence of the charge levelled against him, was able to give complete instruction to his counsel and came prepared with his defence. Although the prosecution did not specify the manner of trafficking under either limbs of s. 39B(1), from the defence posited by the appellant, it could hardly be said that the appellant was in doubt as to what overt act of trafficking he was accused of. He knew he was being charged for trafficking in dangerous drugs. The said error or omission did not occasion a failure of justice. (paras 59, 60, 63 & 64)

(2) There was no real substance in the submission that there was a break in the chain of evidence in relation to the incriminating drugs. There were only five slabs of compressed plant material seen, seized and handed over by PW5 to the investigating officer ('PW9'). These five slabs were the same five slabs handed over by PW9 to PW4 and received and analysed by the latter which finally ended as evidence in court as exhibits. (para 79)

(3) There was no doubt that the drug exhibits seized were the same drug exhibits produced before the High Court, implicating the appellant with the charge. The movement of the exhibits had been clearly explained. PW4 had weighed the drug exhibits using a calibrated weighing machine while PW5 used a Government issued weighing machine available in his

office. He was not asked by either part whether the weighing machine he had used was calibrated. However, it was of no consequence on account that it was weighing done by PW4 which determined the actual weight of the drugs and formed the basis of the charge. The prosecution's submission that the weight of the drug exhibits in the possession of the appellant was 9,623g was of no relevance and inconsequential. There was no evidence to sustain his submission. Hence, his submission was treated as a flawed submission without any basis in evidence. (paras 85, 86 & 87)

Bahasa Malaysia *Headnotes*

Berdasarkan maklumat yang diterima bahawa satu aktiviti pengedaran dadah akan berlaku, pegawai polis PW7 menyamar sebagai ejen perangkap dan menemui seorang lelaki yang dikenali sebagai Black ('perayu') di sebuah gerai untuk membeli ganja. Perayu meminta PW7 menghubunginya dalam satu atau dua minggu lagi. Lebih seminggu kemudian, PW7 menghubungi perayu dan keesokan harinya, mereka bertemu di sebuah stesen minyak. Perayu mengarahkan agar PW7 mengikutnya kerana stesen minyak tersebut dikatakan tidak sesuai untuk urusan mereka. Mereka tiba dan berhenti di sebuah restoran di mana PW7 disuruh menunggu kerana perayu ingin mengambil ganja. Perayu tiba 15 hingga 20 minit kemudian dengan satu beg plastik hitam dan memberitahu PW7 bahawa kanabis ada di dalam beg plastik tersebut. PW7 memeriksa beg plastik tersebut dan menemui lima ketulan mampat bahan tumbuhan yang disyaki ganja. Dia memberi isyarat kepada pasukan serang hendap dan mereka terus bertindak. Perayu cuba melarikan diri tetapi berjaya ditangkap. Lima ketulan mampat bahan tumbuhan tersebut kemudian disahkan oleh ahli kimia ('PW4') sebagai 4,550g kanabis. Perayu dipertuduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('ADB'). Berpuas hati bahawa pihak pendakwaan berjaya membuktikan satu kes *prima facie*, perayu dipanggil membela diri. Dalam pembelaannya, perayu menafikan (i) ada menemui PW7 di gerai; (ii) berunding tentang jualan dan bekalan dadah; (iii) bahawa dia dikenali sebagai Black; dan (iv) mempunyai pengetahuan kandungan beg plastik tersebut dan menunjukkannya kepada PW7. Hakim bicara menolak pembelaan perayu dan mendapati bahawa perayu gagal membangkitkan keraguan munasabah terhadap kes pendakwaan. Perayu didapati bersalah, disabitkan atas kesalahan dan dijatuhkan hukuman mati. Oleh itu, timbul rayuan ini. Isu-isu berbangkit yang perlu diputuskan oleh mahkamah adalah (i) sama ada pertuduhan cacat akibat ketinggalan sama ada pengedaran dilakukan di bawah cabang (a), (b) atau (c) s. 39B(1) ADB; (ii) sama ada terputusnya rantaian keterangan; dan (iii) sama ada terdapat percanggahan dalam berat dadah kerana (a) penanda ('PW5') menyatakannya sebanyak 4,700g; (b) PW4 menyatakannya sebanyak 4,550g; dan (c) pihak pendakwaan menyatakannya sebanyak 9,623g.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman oleh Mahkamah Tinggi)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Pertuduhan adalah cukup, sah dan tidak menjejaskan. Kekhilafan atau ketinggalan yang berlaku bukan perkara penting tetapi sekadar ketidakpatuhan teknikal pada peruntukan undang-undang yang boleh dimaafkan sebagai satu ketidakaturan dan boleh dipulihkan di bawah s. 422 Kanun Tatacara Jenayah. Perayu tidak tersalah arah atau diprejudis oleh ketinggalan pihak pendakwaan. Dia sedar dan tahu sifat dan intipati pertuduhan terhadapnya, boleh memberi arahan lengkap kepada peguamnya dan hadir ke mahkamah dengan pembelaan. Walaupun pihak pendakwaan tidak menyatakan cara pengedaran di bawah mana-mana cabang s. 39B(1), berdasarkan pembelaan perayu, tidak boleh dikatakan bahawa perayu meragui apakah tindakan terang-terangan yang dipertuduh terhadapnya. Dia tahu dia dipertuduh mengedar dadah. Dakwaan kekhilafan atau ketinggalan tidak menyebabkan ketidakadilan.

(2) Hujahan terputusnya rantaian keterangan berkenaan dadah tidak berasas. Hanya terdapat lima ketulan mampat bahan tumbuhan yang dilihat, dirampas dan diserahkan oleh PW5 kepada pegawai penyiasat ('PW9'). Lima ketulan mampat ini adalah lima ketulan mampat sama yang diserahkan oleh PW9 kepada PW4 dan diterima dan dianalisis oleh PW4 yang akhirnya dikemukakan sebagai ekshibit di mahkamah.

(3) Tidak diragui bahawa ekshibit-ekshibit dadah yang dirampas adalah eksihibit-ekshibit dadah sama yang dikemukakan di Mahkamah Tinggi, yang membabitkan perayu dengan pertuduhan. Pergerakan ekshibit-ekshibit diterangkan dengan jelas. PW4 telah menimbang ekshibit-ekshibit tersebut menggunakan mesin penimbang penentu ukur manakala PW5 menggunakan mesin penimbang Kerajaan di pejabatnya. Dia tidak ditanya oleh mana-mana pihak sama ada mesin penimbang yang digunakan boleh menentu ukur. Walau bagaimanapun, tiada apa-apa kesan kerana timbangan dilakukan oleh PW4 yang menentukan berat sebenar dadah dan membentuk asas pertuduhan. Hujahan pihak pendakwaan bahawa berat ekshibit dadah dalam milikan perayu adalah 9,623g tidak relevan dan tidak mempunyai apa-apa kesan. Tiada keterangan untuk menerima hujahan tersebut. Oleh itu, hujahan pihak pendakwaan dianggap cacat kerana tiada asas keterangan.

Case(s) referred to:
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(refd)***
Yong Yow Chee v. PP [1998] 1 SLR 273 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 152, 156, 422
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(1)(a), (b), (c)

For the appellant - Ku Abd Rahman Ku Ismail; M/s Ku Abdul Rahman & Assocs
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman; DPP

[Editor's note: Appeal from High Court, Pulau Pinang; Criminal Trial No: 45B-77-12-2013 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ahmadi Asnawi JCA:

[1] The appellant was charged with the following offence before the High Court at Pulau Pinang:

> Bahawa kamu pada 18.11.2012 jam lebih kurang 9.00 malam, di hadapan gerai makan Adina, Jalan Kubang Menerong, Tasek Gelugor, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedarkan dadah berbahaya iaitu cannabis seberat 4550 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1), Akta Dadah Berbahaya, 1952, yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the conclusion of the trial, the appellant was found guilty and convicted of the offence and was sentenced to suffer the death penalty.

[3] The appeal before us was in respect of the said conviction and sentence.

[4] We considered the issues raised and submissions articulated in support thereof by the parties herein and scrutinised the entire appeal record. We found no merit in the appeal and forthwith dismissed the same and affirmed the conviction and sentence handed down by the High Court.

[5] Here are our grounds.

The Case For The Prosecution

[6] The prosecution's case is grounded upon a transaction by way of sale of cannabis between an agent provocateur and the appellant.

[7] The agent provocateur (AP), PW7 (D/Corp Saiful Bahri bin Zin) and his instructing superior officer, PW5 (ASP Abdul Razak bin Osman), were both from Jabatan Siasatan Jenayah Narkotik (JSJN), Ibu Pejabat Kontingen (IPK), Kedah.

[8] On 6 November 2012, PW7 was directed by PW5 to assume the role of an AP pursuant to drug trafficking activities involving a Malay male known as Fazli in Padang Serai and Kulim.

[9] At about 8.30pm on the same day (6 November 2012), PW7 with the assistance of his informer met the said Fazli (DW2, Fazli bin Matt Nor) at Restoren Nasi Kandar Maidin in Kulim whereupon Fazli then took PW7 to a stall at Jalan Kubang Menerong, Tasek Gelugur, Pulau Pinang.

[10] At the said stall, Fazli proceeded to introduce SP7 to a Malay male who identified himself as 'Black'. PW7 later identified Black as the appellant. PW7 reciprocated and introduced himself as Pak Long Man.

[11] The appellant then asked 'Pak Long, ada apa datang sini' upon which PW7 replied 'saya datang ke sini kerana hendak beli lembu'.

[12] The appellant had used the term 'lembu' for ganja/cannabis.

[13] The appellant then replied 'lembu tidak ada dalam kandang', meaning the ganja was not available.

[14] PW7 enquired the cost of one lembu and was told by the appellant that each would cost RM1,800. PW7 bargained for a reduction of the same but was refused by the appellant. PW7 then informed the appellant that he wanted to purchase five to ten lembu. However, the appellant said that 'buat masa ini lembu di kandang sudah habis dijual' and requested PW7 to contact him in one or two weeks time. The appellant also gave his mobile phone no. 017-4993130 to PW7.

[15] On 17 November 2012, at about 5.40pm, PW7 called the appellant's mobile phone *vide* the aforesaid number. The appellant picked up the telephone call. PW7 asked 'bagaimana kerja kita. Lembu dah ada dalam kandang ke', to which the appellant replied 'lembu ada lima ekor sahaja'. PW7 pestered 'carilah lembu sampai sepuluh ekor'. When enquired, PW7 told the appellant that he would be coming to see him the following day.

[16] On the same day at about 9.40pm, PW7 updated PW5 of the progress of his negotiations with the appellant relating to the purchase of the said ganja. The transaction was to take place at Padang Serai, Kulim, Kedah.

[17] On 18 November 2012 at about 5pm, PW5 briefed his officers pursuant to the same. P/C Abdullah was instructed to be a fellow AP with PW7 and the former was tasked to keep the flash money amounting to RM9,000.

[18] The police team was then divided into three smaller teams. PW5 headed the first team. Insp Saiful Munzir was with him. The second team consisted of Insp Hairul Fazri and two other officers and in the third team were D/Sub Insp Muslim and D/Corp Salwa.

[19] PW7 was directed to raise/remove his cap when the ganja was about to be delivered.

[20] The teams next proceeded to Padang Serai. While on their way, PW5 received a telephone call from PW7 that he will be meeting the appellant at Petronas Petrol Station, Padang Serai. The teams converged to the said petrol station and arrived at about 8pm and took their respective positions as directed by PW5.

[21] PW7 telephoned the appellant upon arrival at the said petrol station and was told to wait there. About 10 minutes later, a Viva motorcar bearing the registration number PKT 2580 ('Viva car') came and stopped next to PW7's motorcar. The appellant was seated at the front passenger seat. A Malay male, later identified as PW8 (Abdul Naim bin Muhamad Yusof), was at the wheels.

[22] The appellant got down from the Viva car. Likewise PW7 too got down from his car and they shook hands. Soon after PW8 also got down from the Viva car. PW7 asked 'bagaimana kerja kita' upon which the appellant said 'tempat ini tidak sesuai'. The appellant then instructed PW7 to follow him to Jalan Kubang Menerong, Tasek Gelugor, Pulau Pinang.

[23] PW7 followed the appellant. They went in their respective motorcars. PW5 and his officers followed suit. They arrived and stopped in front of a restaurant called Kedai Adina, Jalan Kubang Menerong, Tasek Gelugor. The appellant, PW8 and PW7 got down from their respective motorcars. The appellant went up to PW7 and told PW7 to wait and that he wanted to fetch the lembu. The appellant got back into the Viva car and drove off. PW7, PW8 and P/C Abdullah meanwhile waited for the appellant at the said Kedai Adina.

[24] About 15 to 20 minutes later, the appellant came back and stopped the Viva car driven by him next to PW7's motorcar. The appellant alighted and stood outside the driver's door of the Viva car and waved at PW7. PW7 went up to him, whilst PW8 walked to the front left passenger door of the Viva car, followed closely by P/C Abdullah.

[25] As PW7 was getting close to the appellant, the latter closed the driver's door and told PW7 to open the rear right door of the Viva car and said 'Lembu dah ada dalam beg plastik'.

[26] PW7 bent his body into the Viva car and saw a black plastic bag placed at the footwell of the rear left seat. He picked up the black plastic bag which was tied. He untied the black plastic bag and noticed there were five slabs of compressed plant materials suspected to be ganja. A distinctive ganja odour oozed out from the plastic bag.

[27] PW7 placed back the black plastic bag and its contents to where it was and closed the door of the Viva car. He told the appellant 'Oh, barang bagus' and at the same time removed his cap.

[28] At about the same time, the appellant turned his body to face the front of Kedai Adina. PW7 immediately grabbed the appellant's neck, using his right hand and loudly identified himself 'police!'. The appellant struggled and managed to free himself. He fled for about 20 to 25 feet before he was arrested with the assistance of PW5, P/C Abdullah and Insp. Saiful.

[29] PW8 was also arrested by Insp. Hairul and P/C Zakaria at the front left passenger door of the Viva car. PW8 did not put up any resistance.

[30] PW5 proceeded to seize the black plastic bag containing the said five slabs of compressed plant materials suspected to be ganja at the rear left passenger footwell of the Viva car.

[31] At about 9pm, the appellant, PW8 and the black plastic bag containing the five slabs of compressed plant materials were taken to IPD, Seberang Perai Utara. PW5 marked the black plastic bag with the marking 'A' and the five slabs with the markings A1 to A5 together with the date '18 November 2012' and his initials. PW5 also prepared the senarai bongkar, exh. P26 (at p. 294, Jilid II, Rekod Rayuan ('RR')) and subsequently lodged a police report *vide* Tasek Gelugor Report 3053/2012, exh. P32, evinced at p. 296, Jilid II, RR.

[32] The appellant, PW8, the incriminating exhibits and the relevant documents were subsequently handed over to PW9, the investigating officer (Insp Juhaida binti Abdul Rahman), on 19 November 2012 at about 1.20am *vide* sijil serah menyerah barang kes, exh. P27, evinced at p. 295, Jilid II, RR.

[33] The five slabs of compressed plant materials were sent for analysis to the Chemistry Department, Pulau Pinang on 21 November 2012. The chemist, PW4 (Afizawati @ Halimah binti Ayub), confirmed the same to be cannabis ('the said drugs') as defined in s. 2 of the Dangerous Drugs Act 1952 ('DDA 1952'), weighing 4,550g. Her report is exh. P18, evinced at p. 129, Jilid II, RR.

[34] At the end of the prosecution case, the learned trial judge found that the prosecution had indeed made out a *prima facie* against the appellant on the charge proffered against him. The appellant was ordered to enter his defence.

[35] We were on all fours with him.

The Case For The Defence

[36] The appellant opted to give evidence on oath.

[37] The appellant testified that at the time of his arrest (18 November 2012), his two week old baby girl (born on 3 November 2012) was warded in ICU, Penang General Hospital, for treatment. She was suffering from a heart ailment requiring surgery at Institut Jantung Negara.

[38] On 6 November 2012 between 6pm to 8pm, he was with his wife, Rohani binti Abd Manaf (SD3) and his sister Fatimah binti Mohd Shariff (SD4), at the said hospital, visiting his new born baby. At about 8.30pm all three left for home at Kampung Pokok Jenerih. They arrived home at about 9.30pm and the appellant then retired to bed.

[39] On 18 November 2012, the appellant met his friend, PW8, at a wedding reception at Kampung Kubang Menerong. He informed PW8 of the illness suffered by his new born baby. PW8 promised him to raise the fund to cover the cost of the surgery.

[40] Next, PW8 called his friend using the appellant's mobile phone and thereafter PW8 requested the appellant to accompany him to Padang Serai to meet his friend. They went in PW8's motorcar, bearing the registration no. PKT 2580.

[41] Upon arrival at the Petronas Petrol Station at Padang Serai, PW8 alighted from the motorcar and went to meet his friend who was standing outside a Nissan motorcar. The appellant did not know PW8's friend. Instead he went to buy cigarette at the convenience store of the petrol station. After meeting his friend, PW8 requested the appellant to come along with him and his friend to a restaurant called Kedai Adina at Jalan Kubang Menerong.

[42] While on the way to the restaurant, the appellant received a telephone call from his wife, who was then at Penang General Hospital, requesting him to attend to their children's meal at home. Hence upon arrival, he excused himself and left both PW8 and his friend at the said restaurant and using PW8's PKT 2580 motorcar, drove back to his house.

[43] The appellant further testified that he arrived back at the restaurant at about 9pm. When he stopped in front of the said restaurant, PW7 opened the rear door of the PKT 2580 motorcar he was driving and shouted 'police!'. At the same time several police officers rushed towards him and kicked and assaulted him. As a result, he had suffered various facial injuries.

[44] He was arrested by PW5 and handcuffed. A corresponding body search found nothing incriminating upon his person.

[45] PW5 subsequently took him to the rear door of the PKT 2580 motorcar and pointed to a black plastic bag at the footwell of the rear left seat of the motorcar. The appellant denied having any knowledge of the contents of the black plastic bag upon being questioned by PW5.

[46] The appellant also denied that he had met PW7 and SD2 (Fazly bin Matt Noor) at the stall at Jalan Kubang Menerong on 6 November 2012. The appellant also denied negotiating for the sale and supply of the said drugs after he was introduced to PW7 by SD2. The appellant further denied that he was also known as 'Black'.

[47] The learned judge rejected the defence posited by the appellant and found that the appellant had failed to raise any reasonable doubt on the truth of the prosecution's case. Further or alternatively, the defence had also failed to rebut the presumption of trafficking in the said drugs under s. 37(da) of the DDA 1952, invoked against him. The learned judge found that the prosecution has proved its case against the appellant beyond a reasonable doubt as charged.

[48] The appellant was found guilty and convicted of the same thereof.

The Appeal Before Us

[49] The appellant canvassed three grounds of appeal, namely:

(i) the charge was defective;

(ii) issues on identity of the drug exhibits; and

(iii) issues on the weight of the said drugs.

Our Decision

First Issue – Charge Was Defective

[50] Section 39B(1) of the DDA 1952, provides:

> 39B. Trafficking in dangerous drug.
>
> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia:
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

[51] Learned counsel argued that the amended charge proffered against the appellant, evinced at p. 4 of Jilid 1, RR, contained no particulars as to under which limb of s. 39B(1) of the DDA 1952, the appellant was being charged. The charge merely states that "… Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 39B(1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama …". The charge omitted whether the trafficking was committed pursuant to limb (a) or (b) or (c) of s. 39B(1) of the DDA 1952.

[52] Learned counsel contended that the offending section was not stated with precision, in violation of s. 152 of the Criminal Procedure Code ('CPC') and as such the charge was defective as not disclosing an offence under the relevant section of the law, rendering it to be an illegality which is not curable. It had also caused substantial prejudice to the appellant and had equally occasioned a failure of justice.

[53] The learned Deputy Public Prosecutor ('DPP') conceded that there was such an omission. However, he countered that it is a mere 'kesilapan' (error) and such error is curable under s. 422 of the CPC and urged the court to rectify the same under the said section.

[54] In our view, in such event the sole issue is whether the charge levelled against the appellant is defective in substance as disclosing no offence as contended by learned counsel or whether it contained a mere error as contended by the learned DPP and that such error or omission to be more precise, is curable under s. 422 of the CPC. The section provides:

> 422. Subject to the provision contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgement or other proceedings before or during trial or in any inquiry or other proceeding under this code;
>
> (b) ...
>
> (c) ...
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[55] Hence, what is required is the consideration whether the defective charge against the appellant has caused any prejudice to the appellant or has occasioned a failure of justice – see *Yong Yow Chee v. Public Prosecutor* [1998] 1 SLR 273.

[56] A scrutiny of the RR, particularly the notes of evidence recorded during the trial, reveals that it is certainly a case of trafficking under limb (a) of s. 39B(1). Learned counsel conceded that it is so. The testimonies of the relevant prosecution witnesses (PW5, PW7, PW9) upon which the case against the appellant was grounded upon, alluded to a sale transaction of the said drugs between PW7 and the appellant, an act within the definition of trafficking under s. 2 of the DDA 1952. The cross-examination of these witnesses were also grounded upon the issue of the said sale. The defence of the appellant was also anchored upon the denial of the existence of such transaction between himself and PW7 and shifted the entire culpability upon PW8. This much was admitted by learned counsel before us.

[57] The whole tenor of the then learned counsel's submissions at both stages of the trial before the learned judge also alluded to the said sale transaction, an offence of trafficking under limb (a) of s. 39B(1) of the DDA 1952. The learned DPP also devoted his entire submissions upon the commission of an offence under limb (a) of the aforesaid section. The learned judge's findings at the end of the prosecution case was "… I was satisfied that

the prosecution had succeeded in establishing a *prima facie* case of actual drugs trafficking under s. 2 of the Act." At the end of the defence, the learned judge found that the appellant has failed to raise any reasonable doubt on the truth of the prosecution's case.

[58] It seems crystal clear to us that everyone who is in the entire trial were on the same plank, alluding to a common issue ie, the act of trafficking under limb (a) of s. 39B(1) of the DDA 1952. Learned counsel before us was vivid, very much alive to the issue and conceded the same.

[59] It is apparent that the defence was not misled nor prejudiced by the omission of the prosecution to state precisely under what limb of s. 39B(1) of the DDA 1952, the appellant was being charged for.

[60] At all times during the trial, the appellant was apparently aware and knew exactly the nature and essence of the charge levelled against him, was able to give complete instructions to his counsel and he came prepared with his defence. He knew he was being charged for trafficking in a dangerous drug, an offence under limb (a) of s. 39B(1) although the same was omitted in the charge.

[61] The defence posited by the appellant was comprehensive enough and was chronologically in line with the evidence adduced by PW5 and PW7, except that it was replete with denials, in particular on principal issues most incriminating against him – see his defence enumerated in paras. 37 to 46 above.

[62] In brevity, the appellant denied that he had met PW7 and SD2 at the stall at Jalan Kubang Menerong on 6 November 2012. He also denied negotiating for the sale and supply of the said drugs after he was introduced to PW7 by SD2 at the said stall. The appellant further denied that he is also known as 'Black' or that he had introduced himself as 'Black' to PW7. Additionally, the appellant denied showing the black plastic bag containing the said drugs placed at the footwell of the rear left seat of the motorcar driven by him (PKT 2580) to PW7 and informing PW7 that 'lembu ada dalam beg plastik' on 18 November 2012 and equally denied having knowledge of the contents of the said black plastic bag when shown and questioned by PW5 upon his arrest. In a nutshell it is very apparent that the appellant was not misled and was able to answer the charge and he did so in the most vigorous fashion.

[63] In our judgment, in all the circumstances of the case enumerated above, as the appellant was not misled by the error or omission in the charge against him and he knew full well the charge he had to meet, the error or omission in question was not material and the appellant was equally not prejudiced by the same. Although the prosecution has not specified the manner of trafficking under either limbs of s. 39B(1), from the defence

posited by the appellant, it could hardly be said that the appellant was in doubt as to what overt act of trafficking he was accused of. Plainly, the said error or omission did not occasion a failure of justice.

[64] It is our further view that the said error or omission was not a matter of substance but a mere technical non-compliance of the provision of the law which can be condoned as an irregularity and curable on account of s. 422 of the CPC. On the evidence relied by the prosecution, the charge was sufficient and valid. The said error or omission cannot be said to have vitiated the charge and is not fatal to the charge. The appellant was never in doubt as to the offence of which he had been convicted and sentenced.

[65] Section 156 of the CPC also provides a cure should there be any non-compliance with the technical provision of the law. The section enacts that no error or omission in stating the offence or the particulars required to be stated in the charge shall be material unless the accused was misled by it. In our view, the case before us is a fit and proper case for the invocation of this provision to cure the error or omission in the charge levelled against the appellant in addition to the provision under s. 422 of the CPC. We were satisfied that the said error or omission in the charge has not misled nor has caused any prejudice nor has occasioned a failure of justice to the appellant.

[66] Additionally, we noted that this current issue was not canvassed by the defence at any stage of the trial before the learned judge. Hence, it has deprived the learned judge from addressing the same. Equally it has deprived the prosecution to do the needful to rectify the same which can be done at any time, even at the submission stage, before judgment is pronounced. Learned counsel before us admitted that they were aware of the said omission at the trial stage but nevertheless did nothing and did not submit upon the same at both stages of the trial on account that it would operate to the advantage of the appellant, whatever that means.

[67] Interestingly this issue was also not canvassed in the appellant's petition of appeal.

Second Issue – Identity Of The Drug Exhibits

[68] Learned counsel submitted that the learned judge did not take into account PW4's (chemist) evidence in her witness statement that she had received 25 'bongkah' (slabs) of compressed plant materials. Learned counsel brought our attention to PW4's witness statement at p. 102, Jilid 1, RR, and surmised that PW4 had received 25 slabs of compressed plant materials:

> Saya telah memeriksa kotak kadbod tersebut bersama borang permohonan (Borang Polis 31) dengan No. Report Polis: Tasek Gelugor 3053/12. Hasil dari pemeriksaan ke atas setiap kotak tersebut saya dapati di dalamnya berisi satu beg plastik bertanda 'J'. Di dalam beg plastik tersebut berisi lima bungkusan plastik bertanda 'J1' hingga J5'. Setiap satu bungkusan plastik tersebut berisi lima bongkah bahan tumbuhan mampat yang dibalut dengan kertas kerajang timah.

[69] Learned counsel further submitted that the aforesaid evidence by PW4 is inconsistent with PW5's testimony that he had seized the said black plastic bag containing five slabs of compressed plant materials and he had handed over the said plastic bag together with the said five slabs to the investigating officer of the case, PW9.

[70] Learned counsel hence submitted that PW9 must have handed over to PW4, 25 slabs of compressed plant materials instead of five slabs, the amount handed to him by PW5.

[71] Finally, learned counsel submitted that there was no explanation for the said discrepancy but yet the learned judge accepted that five slabs were indeed sent to the chemist and found that learned counsel's challenge that there was a serious break in the chain of evidence was devoid of merit – see p. 138, Jilid 1, RR.

[72] We have tooth-combed the entire evidence of PW4 and at the end of the day we were in agreement with the learned judge that learned counsel's submission on this issue has really no substance nor merit at all. Verily, PW4 had indeed corrected herself in her oral evidence in examination in chief wherein at p. 16, Jilid 1, RR, she had testified:

> Semasa saya terima bungkusan P20A, P21A, P22A, P23A dan P24A, di dalam setiap bungkusan terdapat satu bongkah bahan tumbuhan mampat yang dibalut dengan kertas kerajang timah dan dibalut dengan plastik.

[73] She was not challenged over this correction.

[74] P20A to P24A are the original plastic wrappings of the five slabs of compressed plant materials which was marked by PW5 with the markings A1 to A5 and also marked by PW9 with markings J1 to J5. PW4's oral testimony simply means that in each 'bungkusan' there was only one 'bongkah' (slab) of compressed plant materials. Hence, there were only five slabs of compressed plant materials received by her.

[75] PW4's testimony is consistent and in conformity with the testimonies of PW7 and PW5 that there were only five slabs of compressed plant materials inside the black plastic bag.

[76] It is also consistent with and confirmed by PW5's testimony that he had handed over to PW9 only five slabs of compressed plant materials.

[77] It is also consistent with and confirmed by PW9's testimony that he had received five slabs of compressed plant materials from PW5 and had handed over the same five slabs of compressed plant materials to PW4 for analysis. PW4 confirmed the markings J1 to J5 on the five slabs when she received the same from PW9.

[78] PW4's testimony is also corroborated in terms by her own report (exh. P18, at p. 291 of Jilid II, RR) and in conformity with the senarai bongkar prepared by PW5 (exh. P26, at p. 294, Jilid II, RR); with the sijil serah

menyerah barang kes entered between PW5 and PW9 (exh. P27, at p. 295, Jilid II, RR); with PW5's police report (exh. P32, at p. 296, Jilid II, RR); and with the photograph of the exhibits, P7B, at p. 280, Jilid II, RR. These documentary exhibits alluded to the fact that at all times there were only five slabs of compressed plant materials in question.

[79] We found no real substance in learned counsel's submission that there was a break in the chain of evidence in relation to the said incriminating drug exhibits. We were satisfied that there were only five slabs of compressed plant materials seen by PW7 and seized by PW5 and handed over by PW5 to PW9. These five slabs were the same five slabs that was handed over by PW9 to PW4 and received and analysed by PW4 and finally ended as evidence in court as exhs. P20, P21, P22, P23 and P24.

[80] Interestingly, this ground of appeal was also not canvassed before the learned judge. It was raised for the first time before us.

Third Issue – Weight Of The Said Drugs

[81] Learned counsel complained that the learned judge did not take into consideration the discrepancies of the weight of the said drugs by PW5 which was 4,700g; by PW4 (chemist) which was 4,550g; and by the learned DPP who had submitted at the end of the defence case that the weight of the drugs in the possession of the appellant was 9,623g. The unexplained discrepancies given by the witnesses had created a reasonable doubt upon the identity of the drug exhibits. Meanwhile the learned judge on the other hand had made a finding that the drugs weighed 4.6kg – p. 144, Jilid 1, RR.

[82] The law in respect of this issue is settled. In *Loh Kah Loon v. PP* [2011] 5 CLJ 345, the Federal Court had stated:

> [17] It can be seen from the above that there was no break in the chain of evidence regarding the exhibits. The identity of the exhibit was well established. Thus, on the facts of this case, the difference in the weight of the exhibits as found by the police and the chemist, by itself cannot be said to have created doubt as to the identity of the exhibits. The real question is whether the exhibits recovered by the police is the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence. We have no doubt it was the same exhibits.

[83] Both PW5 and PW9 had identified the drug exhibits that were produced in court. Both these witnesses had also identified the markings made by them on the exhibits, including the date and the signatures they had affixed on the five slabs of compressed plant materials seized from the appellant. PW4 had also noticed and identified the markings she found on the exhibits when she received it from PW9.

[84] Additionally, the handing over or transfer of the drugs exhibits from PW5 to PW9 was properly documented *vide* sijil serah menyerah barang kes, exh. P27. The transfer of the drug exhibits from PW9 to PW4 was

documented *vide* acknowledgement receipt, exh. P17, p. 290, Jilid II, RR, issued by PW4 to PW9. The return of the drug exhibits by PW4 to PW9 was also documented *vide* PW4's chemist report, exh. P18. The seizure of the drug exhibits from the appellant by PW5 was documented *vide* senarai bongkar, exh. P26. Finally the drug exhibits were produced in court by PW4.

[85] Upon the evidence enumerated above, we harboured no doubt that the drug exhibits seized were the same drug exhibits produced before the High Court implicating the appellant with the charge. The evidence showed there was no break in the chain of evidence. The movement of the exhibits was clearly explained.

[86] We also took note that PW4 had weighed the drug exhibits using a calibrated weighing machine whereas PW5 had used a Government issued weighing machine available in his office. He was not asked by either party whether the weighing machine he had used was calibrated. However, it is of no consequence on account that it is the weighing done by the chemist which determines the actual weight of the drugs and forms the basis of the charge – see *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945.

[87] The learned DPP's submission before the learned trial judge that the weight of the drug exhibits in the possession of the appellant was 9,623g is of no relevance and inconsequential. There is no evidence to sustain his submission. Hence his submission is to be treated as a flawed submission without any basis in evidence. Likewise, the findings of the learned judge on the weight of 4.6kg did not vitiate his finding in calling the appellant to enter his defence and in convicting the appellant.

Conclusion

[88] For all the reasons given above, we find no real substance in this appeal to merit our intervention. The appeal against conviction is dismissed and the sentence handed down by the High Court is confirmed.